



BORA LASKIN LAW LIBRARY
3 1761 03348 8693

J E W I S H L A W

Professor Ernest J. Weinrib

**Faculty of Law
University of Toronto**

1990

387
WES
1770

LAW LIBRARY

SEP 6 1990

FACULTY OF LAW
UNIVERSITY OF TORONTO

**FACULTY OF LAW LIBRARY
UNIVERSITY OF TORONTO**

J E W I S H L A W

Professor Ernest J. Weinrib

**Faculty of Law
University of Toronto**

1990



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

<https://archive.org/details/jewishlaw00wein>

TABLE OF CONTENTS

	PAGE #
I. The Sources of Jewish Law	1
Goldenberg, Talmud	1
A Talmudic Example: Babylonian Talmud, Kiddushin 49a ("Words in the heart are not words.")	18
Wieseltier, Unlocking the Rabbis' Secrets	22
II. Mitsvot: Jewish Law as a Jurisprudence of Obligation	24
A. The Nature of "Mitzvah"	
Leibowitz, Commandments	24
Cover, Obligation: A Jewish Jurisprudence of the Social Order	34
Babylonian Talmud, Baba Kamma 86b	43
B. The Example of Unconscionability	
Leviticus 25.1-17	45
Babylonian Talmud, Baba Mezia 49b	46
Hegel, Philosophy of Right, s. 77	60
Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract	61
C. The Example of Rescue	
Babylonian Talmud, Sanhedrin 73a	67
Weinrib, Right and Advantage in Private Law	76
Fletcher, Defensive Force as an Act of Rescue	83
Weinrib, Rescue and Restitution	91
III. The Rationality of Jewish Law	99
A. Hukkim and Mishpatim	
Leviticus 19.19	99
Deuteronomy 22.11	99
Babylonian Talmud, Yoma 67b	99
B. Saadya Gaon	
Saadya, The Book of Doctrines and Beliefs	100
C. Maimonides	
Maimonides, Guide to the Perplexed	122
Maimonides, Book of Commandments	159
Twersky, An Introduction to the Code of Maimonides 453	160

IV. Legal Method	165
A. Reading the Bible	
1. What is "Reading"?	
Fried, Sonnet LXV and the "Black Ink" of the Framers' Intention	165
Dworkin, How to Read the Civil Rights Act	175
Fish, Is There a Text in This Class?	187
Goldin, Of Change and Adaptation in Judaism	199
2. Purposive Interpretation	
Deuteronomy 17, 14-17	205
Deuteronomy 24, 17-18	205
Babylonian Talmud, Baba Mezia 115a	206
3. Some Examples	
(a) How Many is Forty?	
Deuteronomy 25, 1-3	207
Babylonian Talmud, Makkot 22a	207
(b) An Eye for an Eye	
Exodus 21, 22-25	209
Leviticus 24, 17-22	209
Numbers 36, 30-34	209
Deuteronomy 19, 15-21	210
Babylonian Talmud, Baba Kamma 83a	211
B. Innovation	
1. "And Where Did He Command Us?"	
Babylonian Talmud, Shabbat 23a	217
Deuteronomy 17, 8-13	218
Deuteronomy 32, 7	218
2. "Uprooting Something from the Torah"	
Babylonian Talmud, Yebamoth 89b	219
Roth, The Halakhic Process: A Systemic Analysis 185-193	225
Deuteronomy 15, 1-11	233
Babylonian Talmud, Gittin 34b, 36a	234
Silberg, Talmudic Law and the Modern State 22-28, 37-40	236

3. "Do not Add or Take Away"

Deuteronomy 4, 2	243
Deuteronomy 13, 1	243
Babylonian Talmud, Rosh Hashanah 28b	244
Roth, The Halakhic Process: A Systematic Analysis 156	246

C. Legal Reasoning

1. Considerations that Stand to Reason (S'vara)

Babylonian Talmud, Berachot 35a	256
Babylonian Talmud, Sanhedrin 74a	257
Babylonian Talmud, Yevamot 35b	258

2. Conceptualism and Casuistry

Babylonian Talmud, Sanhedrin 72a	259
Babylonian Talmud, Baba Kamma 26a	260
<u>Home Office v. Dorset Yacht</u> (Lord Diplock)	264

3. Right Answers

Dworkin, Is There Really No Right Answer in Hard Cases?	269
Babylonian Talmud, Baba Mezia 59a	291
Babylonian Talmud, Erubin 13b	295

D. Writing and Codification

Dorff and Rosett, A Living Tree: The Roots and Growth of Jewish Law, 366	297
Maimonides, Introduction to the Mishneh Torah	305
R. Abraham ben David of Posquieres, Comment on Introduction to the Mishneh Torah	310
R. Hayyim Bar Bezalel, Vikkuah Mayyim Hayyim	311

An Example: Unintentional Killing

Deuteronomy 19, 1-13	312
Babylonian Talmud, Makkot 7a	315
Maimonides, Mishneh Torah, Laws of Murder and the Preservation of Life, Chapter 6	317

The Problem More Generally Considered:

Hegel, The Philosophy of Right, s. 211	320
Plato, Phaedrus 274	322
Husserl, The Origins of Geometry	326

E. Jewish Legal Method: The Classic Statement	
Maimonides, <i>Introduction to the Commentary on the Mishnah</i>	342
IV. Some Contemporary Problems	357
A. Abortion	
1. Basic Texts	
Exodus 21, 22-24	357
Mishnah, <i>Oholot</i> 7, 6	357
Babylonian Talmud, <i>Sanhedrin</i> 57b	357
Rashi's comment on "Even for Fetuses"	358
Babylonian Talmud, <i>Sanhedrin</i> 59a	358
Tosafot on <i>Sanhedrin</i> 59a	358
Babylonian Talmud, <i>Sanhedrin</i> 72b	359
Rashi's comment on "If his head has emerged"	359
Maimonides, <i>Laws of Murder and the Preservation of Life</i> , Chapter 1	359
Deuteronomy 25, 7	360
Babylonian Talmud, <i>Arakin</i> 7a	361
Babylonian Talmud, <i>Niddah</i> 44a	363
Tosafot's commentary on "he dies first"	363
2. Interpretations and Controversies	
Biale, <i>Women and Jewish Law</i> 219	364
Halibard, <i>Abortion in Jewish Law: A Recent Judgment</i> ..	378
Sinclair, <i>Law and Morality in Halakhic Bioethics, Appendix: The Tay-Sachs Fetus Debate</i>	390
B. Divorce	
1. The Biblical Basis	
Deuteronomy 24, 1-4	395
2. The Grounds for Divorce	
(a) "Some Unseemly Thing"	
Babylonian Talmud, <i>Gittin</i> 90a	395
(b) Smells, Boils, and Other Offensive Conditions	
Babylonian Talmud, <i>Ketuboth</i> 77a	398
Biale, <i>Women and Jewish Law</i> 92-96	402

(c) "He is repulsive to me"

Babylonian Talmud, Ketuboth 63b	405
Responsum of Rav Sherira Gaon	407
Riskin, Women and Jewish Divorce 75-77	409
Maimonides, Mishneh Torah, The Laws of Marital Status, 14, 8	411
Riskin, Women and Jewish Divorce 93-111	413
Gartner, Review of Riskin, Women and Jewish Divorce	426
Another Example of the Jurisprudence of Rabbenu Tam: Tosafot on Sanhedrin 74b	432

(d) Compelling the Husband to Grant the Divorce

Babylonian Talmud, Baba Bathra 47b	435
Maimonides, Mishneh Torah, Laws of Divorce, Chapter 1	436
Maimonides, Mishneh Torah, Laws of Divorce, Chapter 2	438

3. The Agunah ("The Anchored Woman")

(a) The Problem in Jewish Law

Babylonian Talmud, Gittin 32a	439
Warshofsky, The Recalcitrant Husband	441

(b) The Intervention of Non-Jewish Law

Morris v. Morris (1973), 36 D.L.R. 3d 447 (Man. Q.B.)	459
Morris v. Morris (1973), 42 D.L.R. 3d 550 (Man. C.A.)	467
Avitzur v. Avitzur, 58 N.Y. 2d 158 (C.A. 1983)	486
Family Law Act, S.O. 1986, c. 4, s. 2	495
Whyte, Memorandum of Law	496
An Act to Amend the Divorce Act (Barriers to Religious Remarriage)	502

